No. 02-1340

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JEROLD DANIEL FRIEDMAN,
also known as JERRY FRIEDMAN,

Petitioner,

v.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, KAISER FOUNDATION HOSPITALS, and KAISER FOUNDATION HEALTH PLAN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The corporate Respondents, Kaiser Foundation Hospitals and Kaiser Foundation Health Plan, Inc., have no parent companies and are both not-for-profit corporations.

PETITIONER'S WRIT SHOULD BE DENIED

In a last ditch attempt to breathe life back into defunct claims, Petitioner attempts to manufacture federal questions to present to this Court that were not properly raised or decided in the proceedings below.

Petitioner sued Respondents under California's Fair Employment and Housing Act ("FEHA") claiming that his "vegan" lifestyle constituted a protected "religion." Respondents demurred to his claims on the ground that "vegan" is not a protected religion under the FEHA. In opposition to the demurrer, Petitioner did not argue that Respondents' position would run afoul of the Establishment Clause, the First Amendment, or any other Constitutional protections.[1] Instead, he persisted with his argument that a "vegan" lifestyle falls squarely within FEHA's definition of "religious creed." It was not until the California Court of Appeal affirmed the ruling on Respondents' demurrer that Petitioner belatedly raised his "constitutional" arguments via petition for rehearing to the California Court of Appeal. (Petitioner's Appendix, 230a-232a). However, it is well settled under California law that new legal arguments cannot be raised for the first time in a petition for rehearing. *Gentis v. Safeguard Business Systems, Inc.*, 60 Cal. App. 4th 1294, 1308 (1998); *Conservatorship of Susan T.*, 8 Cal. 4th 1005, 1013 (1994); *A.F. Estabrook Co. v. Industrial Acc. Com.*, 177 Cal. 767, 771 (1918).[2] Petitioner's delay in

1. Petitioner's passing reference that FEHA's protections should be "broader" than constitutional protections was entirely insufficient to bring the federal questions pressed in his Petition to this Court to the attention of the state court. (Petitioner's Appendix, 132a, 158a).

2. *See also California Rule of Court* 29(b)(1): "As a matter of public policy, on petition for review the Supreme Court normally will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal."

raising the issues he now seeks to present to this Court dooms his Petition. *See Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).

Moreover, this case does not involve a federal question. Rather, Petitioner is dissatisfied with the test established by the California Court of Appeal to determine whether beliefs constitute a "religious creed" under the FEHA. He therefore petitions this Court to intervene and redefine "religious creed" under California law. But, the Supreme Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge *federal* rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (emphasis added). Here, *state* rights, not federal, are at issue.

Despite ample opportunity to do so, Petitioner failed to properly raise any "constitutional" concerns regarding Respondents' arguments that a "vegan" lifestyle does not constitute a "religious creed" under the FEHA. It is too late to do so now. "It would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 520 U.S. 83, 90 (1997).

CONCLUSION

This was a California case about a California law. Petitioner's belated attempt to make a federal case out of it is simply improper. Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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